

## 1 UNITED STATES DISTRICT COURT

## 2 DISTRICT OF NEW MEXICO

3 HECTOR GARCIA, JR.,  
4 Personal Representative to the  
Estate of Hector Garcia  
estate of Hector Garcia,

5 Plaintiff,

6 v.

7 BOARD OF COUNTY COMMISSIONERS  
8 FOR THE COUNTY OF DONA ANA, et  
al,9 Defendants.  
10

Case No. 2:21-cv-00485-DHU-GJF

Albuquerque, New Mexico

December 15, 2022

9:30 a.m.

11 TRANSCRIPT OF MOTION HEARING  
12 BEFORE THE HONORABLE GREGORY J. FOURATT  
UNITED STATES MAGISTRATE JUDGE

## 13 APPEARANCES:

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16 For the Defendants:

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24 Proceedings recorded by electronic sound recording;  
25 transcript produced by transcription service.

1 (Call to order at 9:30 a.m.)

2 MR. COYTE: Good morning or good afternoon. I'm  
3 actually all actually going to in a time zone. So it's evening  
4 where I am.

5 THE COURT: Tell us where you are?

6 MR. COYTE: I've gone back to England to visit my  
7 family for Christmas. So I'm actually in a little village in  
8 the Cotswolds, praying the Internet holds out for as long as we  
9 go.

10 THE COURT: Well, we hope that it does. What time is  
11 it there?

12 MR. COYTE: It's 5:00 or 4:30.

13 THE COURT: Okay.

14 MR. COYTE: 4:30.

15 THE COURT: All right, am I interrupting tea?

16 MR. COYTE: Yes, they're downstairs having tea as we  
17 speak. So yeah.

18 THE COURT: Mr. Paoli, good morning to you.

19 MR. PAOLI: Good morning, Judge.

20 THE COURT: Did I pronounce your last name the way  
21 that you do?

22 MR. PAOLI: Yes, you did. Thank you.

23 THE COURT: Okay. Guys, we are officially on the  
24 record in the Estate of Hector Garcia, Senior represented by  
25 his son against Corizon Health, Incorporated and others. It's

1 21 Civil 485.

2 And today, we're going to have oral argument on the  
3 Plaintiff's motion to compel. I appreciate the briefing. I've  
4 read it. I've read it every exhibit and for one of the few  
5 times I've actually read every case that the parties have cited  
6 because I think I needed that education, but I still have a lot  
7 of questions. And you're about to find that out.

8 And one of the reasons why I do this by Zoom is so  
9 that you can see this signal. When I do this, all I want you  
10 to do is stop talking because you have answered my question and  
11 I'm ready to ask another one. I promise I'm not accusing you  
12 of filibustering, but you've done what I needed to and it's  
13 time to move on.

14 I don't exactly know how long our conversation today  
15 will take. We sent you an email yesterday just in case it  
16 expands beyond the one hour.

17 If at any time you need a break, either for comfort  
18 purposes or otherwise, let me know. This is a pretty flexible  
19 hearing this morning.

20 So, Mr. Paoli, it's not your motion. But it is your  
21 burden. And I wanted to start by questioning you today. You  
22 got any objection to that?

23 MR. PAOLI: Not at all, Your Honor.

24 THE COURT: So let me clear away some underbrush  
25 first. In response to my order on Monday, on Tuesday morning,

1 you sent to chambers for in camera inspection a single  
2 document. And without disclosing the contents of this  
3 document, I will state for the record that it is five pages  
4 long.

5 Is this the only document that the Defendants have  
6 withheld under the privilege that I'm going to just refer to as  
7 PSQIA?

8 MR. PAOLI: That's correct, Your Honor.

9 THE COURT: The reason I'm asking is Ms. Mooningham's  
10 (phonetic) declaration at paragraph 16 says a little more than  
11 that. And I wanted to make sure that you and I have the same  
12 understanding that she does. So do you have access to her  
13 declaration?

14 MR. PAOLI: Yes.

15 THE COURT: So her declaration says the patient  
16 safety document -- and is what you sent me what she's  
17 describing as the patient safety document?

18 MR. PAOLI: That's right, Your Honor.

19 THE COURT: Okay, she says so the patient safety  
20 document describes in paragraph 15 and all other documentation  
21 relating to it, what does she mean?

22 MR. PAOLI: So Your Honor, how it was described was  
23 we have the summary that I identified in the privilege log as  
24 the people who specifically generated that. And then, there  
25 was the attachment to that particular summary.

1           And so, you have you'll note in the privilege log  
2       we've got the author identified and I think there's two names  
3       identified. It's Ms. Newell, N-E-W-E-L-L and then Mr. Berumen.

4           And then, the attachment therein comes from another  
5       lady named Ms. Boorsman (phonetic), but it's all basically part  
6       of that one same document. And that's the reference to the  
7       documentation relating to the actual patient safety report  
8       that's at issue here.

9           THE COURT: Okay, all right. But the document that  
10      you sent me is all that you've withheld and it's really all  
11      that Ms. Mooningham is referring to?

12          MR. PAOLI: That's correct. I'm not aware of any  
13      other document that she is referring to or that's at issue for  
14      purposes of this motion.

15          THE COURT: Okay. And your position is  
16      straightforward. Your position is is that 100 percent of this  
17      document is protected by the privilege?

18          MR. PAOLI: That's correct, Your Honor.

19          THE COURT: You haven't said that, you know, some  
20      portions of it may be disclosable, but other portions of it are  
21      protected. Your position is all of it is protected?

22          MR. PAOLI: That's right, Your Honor. Now I realize  
23      the Court is going to have to kind of parse through it. And  
24      we'll have to make some determination with respect to portions  
25      of it because it's more than one page, certainly, and I

1 understand that. But it's our position that all of it was  
2 generated for purposes of the PSQIA privilege.

3 THE COURT: Okay. So how long have you been  
4 representing Corizon?

5 MR. PAOLI: Approximately, Judge, 12 to 13 years.  
6 Maybe it may actually go up to 15 years, Your Honor.

7 THE COURT: Okay. When did, if you know, when did  
8 Corizon begin to provide the health care service at the Dona  
9 Ana County Detention Center?

10 MR. COYTE: I'm not sure, Your Honor the initial  
11 contract, but I want to say approximately 2007. It may -- I  
12 believe it was before 2010 was the initial contract. And then,  
13 there's been a series of renewals afterward. And I want to say  
14 my best estimation it was before 2010.

15 THE COURT: Okay. And I'm really going to stretch  
16 your memory here, but this is -- I'm building to a point and  
17 you're educating me.

18 Has Corizon provided whether it's through a single  
19 contract or a series of contract renewals health care services  
20 at Dona Ana County since it began? We'll say it's 2007, since  
21 that time?

22 MR. PAOLI: Yes, Your Honor, there was the initial  
23 contract award and a series of renewals. And there has been no  
24 intervening contractor to provide medical care to inmates since  
25 the initial award of the contract.

1           THE COURT: Okay, that was better. The answer was  
2 better stated than my question. So far as you can remember,  
3 did Corizon have an -- a contractual obligation to the county  
4 to conduct a mortality review after every in custody death  
5 dating back to 2007?

6           MR. PAOLI: Judge, I'm not prepared to say that  
7 specifically only because prior to today and I apologize I  
8 didn't review the language of every single contract and all the  
9 language of the renewals.

10           My understanding is that there has not been  
11 substantive changes with respect to the contract because it was  
12 an initial contract award. And then, the renewals were  
13 essentially a one to two page renewal.

14           THE COURT: Okay.

15           MR. PAOLI: But I'm not aware specifically of every  
16 single contract term and I don't want it make that  
17 representation. I just don't know.

18           THE COURT: All right. The third-party peer review  
19 contract with the Missouri outfit, the version of that that I  
20 have in this record dates back to I think it's October of 2015.  
21 Was that the first time Corizon engaged that service with  
22 respect to Dona Ana County Detention Center or on a broader  
23 scale?

24           MR. PAOLI: Yes, Your Honor, that is my  
25 understanding. I'm not aware of any other patient safety

1 organizational contract that my client has.

2 THE COURT: Okay, so one thing I don't know because  
3 it's not in the record is what does the sentinel event policy,  
4 this is Exhibit 6 to the Plaintiff's motion, Corizon has an  
5 internal policy in which it declares that deaths are reviewed  
6 in accordance with the Corizon Health sentinel event policy.

7 Mr. Paoli, have you seen that policy?

8 MR. PAOLI: Yes, I have Your Honor. I believe that's  
9 the one that's at issue or if unless I'm misunderstanding, I  
10 think that's the one referenced in Plaintiff's particular  
11 motion, the exhibit.

12 THE COURT: Did you disclose -- did you or did  
13 Corizon disclose the policy to the Plaintiffs in this case?

14 MR. PAOLI: I believe so, Your Honor. Plaintiff is  
15 has asked for the policy and procedure manual. I'm not aware  
16 of one that has been withheld back for any reason.

17 THE COURT: Okay. How long is that policy?

18 MR. PAOLI: It's a policy and procedure manual, Your  
19 Honor. It's approximately 90 to 100 pages is my best memory.

20 THE COURT: Okay. Does it have a -- okay, does it  
21 have section in it that dictates what Corizon is supposed to do  
22 when it conducts a mortality review?

23 MR. PAOLI: In general terms, yes, Your Honor.

24 THE COURT: Does it describe or prescribe a certain  
25 report that needs to be generated?



1 MR. PAOLI: Other than a general description of a  
2 sentinel event report, I don't think it has a specific  
3 definition or identification.

4 THE COURT: Do you know how long Corizon has had this  
5 sentinel event policy?

6 MR. PAOLI: Not specifically, Your Honor. I am aware  
7 in general terms that the policy has been in place for some  
8 time, but I could not tell you with any certainty when it was  
9 added to the policy, whether it was since I had been working  
10 with my particular client or not. I just don't know.

11 THE COURT: Okay. And so, then you wouldn't know  
12 whether the sentinel event policy pre-dates or post-dates the  
13 contract with the Missouri third-party peer review company?

14 MR. PAOLI: Not specifically, Your Honor. Not at  
15 this time, not without having had a chance to kind of through  
16 that and review that.

17 THE COURT: Okay. I'm going to want to look at this  
18 sentinel event policy. So I don't care which of the two of you  
19 sends it to me, but if one of you could send that to chambers  
20 sometime let's say before the close of business tomorrow, that  
21 would be helpful.

22 Mr. Paoli, in the last -- let's say the last -- since  
23 the contract with the third-party peer review became effective,  
24 how many in custody deaths have there been at Dona Ana County?

25 MR. PAOLI: That I'm aware of, Your Honor? So I

1 guess we're looking at from the 2015 onward?

2 THE COURT: Yeah.

3 MR. PAOLI: Oh, I knew of obviously this case. Mr.  
4 Coyte and I are counsel on a separate pending case that's  
5 pending in another court.

6 I believe there was a prior case. And then there was  
7 one suicide case. Well, there was one suicide that did not  
8 turn into litigation so far as I know. So I -- my best  
9 estimate Your Honor, is five total.

10 THE COURT: Okay.

11 MR. PAOLI: That's -- keep in mind please understand  
12 that's an estimate without me having had the chance to kind of  
13 think through, well, a period from 2015 all the way to 2022.

14 THE COURT: Let's turn to the excerpts from the  
15 contract that Corizon has with Dona Ana County. And I'm  
16 referring to the excerpts that appear at Exhibits 3 and 4 of  
17 the Plaintiff's motion.

18 And Mr. Paoli, I'm going to assume that these  
19 excerpts are from the contract that governed the relationship  
20 between Corizon and the county on the day that Mr. Garcia died.  
21 Would that be a safe assumption?

22 MR. PAOLI: Yes, Your Honor.

23 THE COURT: Okay, so as Plaintiff argues and as I  
24 read the contract, Corizon, there are two separate provisions  
25 of the contract that dictate to Corizon that it must do

1 something every time there's an in custody death. The first of  
2 those made a decision the first of them I guess it is.

3 Well, it's not the first of them. I'm going in  
4 reverse order. Paragraph 5.1.2.3 entitled "Mortality Review  
5 Process," the county orders the contractor to establish a  
6 mortality review process. And I take it from the policy that  
7 Corizon does that by complying with its own sentinel event  
8 policy. Yes?

9 MR. COYTE: Yes, Your Honor.

10 THE COURT: Okay, this paragraph also says that that  
11 if the county requests, the contractor has to participate in a  
12 specific meeting that would have a specific agenda. Do you  
13 know if that happened here?

14 MR. PAOLI: I do not, Your Honor. I know and this is  
15 I think partially relevant to the Court's consideration. I  
16 know Mr. Coyte has submitted on behalf of his client multiple  
17 public -- inspection of public records requests to the county  
18 to seek all documentation relating to Hector Garcia.

19 And incidentally, there was no such documentation  
20 provided by the county in response to the HIPAA request.

21 THE COURT: Yeah.

22 MR. PAOLI: It leads me to believe that there was no  
23 such documentation created at any type of meeting that may or  
24 may not have occurred. I don't even know if a meeting actually  
25 occurred --

1 THE COURT: Right.

2 MR. PAOLI: -- specifically.

3 THE COURT: Do you know whether Corizon complied with  
4 its contractual obligation to conduct a -- well, you're going  
5 to point me to this thing. And what I'm asking about is the  
6 obligation that Corizon had with the county to conduct a  
7 mortality review. Did the county do so?

8 MR. PAOLI: Did the county do so, Your Honor? I'm  
9 not following the question. I apologize.

10 THE COURT: I'm sorry. Did Corizon do so in this  
11 case?

12 MR. PAOLI: Yes, Your Honor, I believe so. I believe  
13 that's ultimately why we're here in large part to a degree.

14 THE COURT: And what I'm trying to get at is how does  
15 Corizon prove to the county that it complied with its contract  
16 obligation to the county to conduct a mortality review? Do  
17 they produce something to the county?

18 MR. COYTE: Yeah, Your Honor, that's a really  
19 important issue and I'm glad you picked up on that that. So  
20 far as I know, and I think it's an established by Ms.  
21 Mooningham's declaration, the actual mortality review, the  
22 sentinel event review document is not produced to the county.

23 And specifically, paragraph 16 of her declaration  
24 points out Corizon does not share that documentation with its  
25 clients.

1           And of course here, the county is the actual client  
2           that's involved here. So while 5.1.2.3 contemplates the  
3           obligation to actually do the review, that section does not  
4           specify that the actual documentation that's created as part of  
5           that review is actually going to be provided to the county.

6           And I think that's a substantial disagreement between  
7           Plaintiff and Defendant with respect to what the scope of the  
8           contractual obligation is because that's not done. It's never  
9           been done so far as I'm aware. And I don't believe that the  
10          county has the privilege -- or the documents that are claimed  
11          to be privileged here.

12          It's -- they weren't provided as such unless the  
13          Court concludes that somehow Ms. Mooningham is making some  
14          false statement in her declaration.

15          THE COURT: Well, I'm going to ask you in a minute or  
16          several minutes exactly what treatment I'm supposed to give her  
17          declaration.

18          But let's go to the other provision, which is 2. and  
19          it's Plaintiff's Exhibit 4. It's Section 2.0 or paragraph 2.0  
20          of the contract between Corizon and the county. And there, the  
21          county is requiring Corizon to comply with among other things  
22          the National Commission on Correctional Health Care Standards.  
23          And in paragraph 5, Mr. Coyte has attached what those standards  
24          are in the event of an inmate death.

25          You don't contest that that is what NCCHC says should

1 be done when an inmate dies?

2 MR. PAOLI: No, Your Honor, you know, I don't know  
3 that the exhibit per se is authenticated directly from NCCHC,  
4 but I'm not aware of a specific statement from NCCHC that  
5 differs from the exhibit that was tendered by the Plaintiff.

6 THE COURT: Okay. Your response didn't contest the  
7 authenticity of this and it's a little unfair for us to do that  
8 at oral argument because I suspect Mr. Coyte might have been  
9 able to provide some additional assurance that this was  
10 authentic had he known that was a concern.

11 As I read Exhibit 5, I can't help but conclude that  
12 the NCCHC contemplates the production of a report. You don't  
13 disagree with that, do you?

14 MR. PAOLI: The production of a report to whom, Your  
15 Honor?

16 THE COURT: Well, I'm not sure yet.

17 MR. PAOLI: Okay.

18 THE COURT: But the production of a report. I mean,  
19 we're -- they're telling us that this is done -- this should be  
20 done in at least two phases. And they tell us what should  
21 occur in those phases and what the points or what the purposes  
22 of the various phases are.

23 And I think it would be irrational for me to think  
24 that that is done without the production of some kind of  
25 report. Yes?

1 MR. PAOLI: Yes, Your Honor. I understand that  
2 point.

3 THE COURT: Okay. Give me just a second. So Exhibit  
4 6, the internal policy of Corizon, there's no suggestion at  
5 least in this excerpt of the purpose for which the mortality  
6 reviews are done.

7 I mean, whoever drafted this isn't saying for the  
8 purpose of complying with third-party peer review or for the  
9 purpose of complying with our, you know, with our detention  
10 center client, for example, a county or a city. There's no  
11 reference in this exhibit to the privilege that you're  
12 invoking. Yes?

13 MR. PAOLI: In that specific exhibit, I agree with  
14 that, Your Honor.

15 THE COURT: So -- and this may be a version of a  
16 question I asked you already or a variation. Do you know  
17 whether this sentinel event policy preceded October of 2015?

18 MR. PAOLI: Yes, I do, Your Honor. And my belief and  
19 understanding and I think I'll confirm this through all the  
20 prior policy and procedures manual is it did precede the entry  
21 into the contract with the Missouri Center for Patient Safety.

22 THE COURT: Okay.

23 MR. PAOLI: The policy and procedure manual has been  
24 modified to a limited degree over the years since I have worked  
25 with the client.

1 But in large part, I don't know of any specific  
2 change to the specific Exhibit 6 language that you're referring  
3 to between the pre-2015 period and the post-2015 period.

4 THE COURT: So if Mr. Garcia's death had occurred  
5 prior to the effective date of the contract with the Missouri  
6 company, Corizon would be in a substantially different legal  
7 position with respect to the federal privilege?

8 MR. PAOLI: I agree, Your Honor. And I would point  
9 out to you that's one of the distinctions that I think is  
10 critical in understanding why Tanner (phonetic) came out the  
11 way it did.

12 Tanner has specific language on page 1224 in which  
13 Judge Browning's decision notes that the underlying contract  
14 with the patient safety organization, there wasn't proof that  
15 it was actually in effect at the time the documents that that  
16 were at issue. So I don't view Tanner as a wholesale rejection  
17 of the privilege.

18 THE COURT: Yeah, I'm going to have some questions  
19 about Tanner for Mr. Coyte. So your position today, and I  
20 didn't know this. And there was no reason for it to come up in  
21 the briefing. Your position today is that so far as you're  
22 aware, Corizon has never disclosed any mortality review report  
23 to the county since October of 2015?

24 MR. PAOLI: That's correct, Your Honor. Post  
25 contract with the Missouri Center for Patient Safety, I'm not



1 aware of any. I've never seen any in connection with the cases  
2 that I have personally handled on behalf of this client,  
3 relating to Dona Ana County Detention Center.

4 THE COURT: All right. So I'm looking at this, the  
5 document that you sent me. And it's -- and I want to talk  
6 about it in general terms so as to not to give away the store.

7 But on page 1, the top half of the page, and it's --  
8 I mean, Mr. Coyte has briefed and complained that Mr. Berumen  
9 should not be allow to invoke the privilege as he was sort of  
10 directly involved in the health care decisions associated with  
11 Mr. Garcia.

12 But I read this. I've read it three times. And Mr.  
13 Paoli, to me, it is historical it's factual, it is  
14 chronological. And it does not contain anything that I would  
15 consider evaluative or self-critical or dictating things that  
16 we could have done better or corrective action plans. Do you  
17 agree?

18 MR. PAOLI: I don't, Your Honor. I don't. And let  
19 me just start articulate why. In order for corrective action  
20 to be taken, there has to be a summary of the incident that is  
21 provided by someone with some knowledge.

22 Now I realize there was a dispute between the parties  
23 as to whether that could be an individual provider involved  
24 with the care or not, but as a preliminary matter, before we're  
25 going to try to evaluate whether some type of correction action

1 can be done, the statute contemplates that you're going to  
2 develop and disseminate certain times of information.

3 And I think the first part of that is the summary of  
4 what happened even if the provider is not individually blaming  
5 himself or herself and identifying specific room or items for  
6 improvement. So I don't 100 percent agree with the Court's  
7 characterization on that issue.

8 THE COURT: The overall document certainly has an  
9 evaluative dimension to it. I was just talking about -- I was  
10 just talking about the history, the narrative piece that is the  
11 first half of page 1. Every single sentence seemed to me to be  
12 relating to us history, something that happened. You read it  
13 differently?

14 MR. PAOLI: No, Your Honor.

15 THE COURT: I -- let me add. I know why this was  
16 created. I mean, there wouldn't have -- there would be no way  
17 to have a meaningful evaluation if we didn't have this going  
18 first obviously.

19 But if this were by itself, the top half of page 1  
20 were by itself, that seems to me to be nothing more than a  
21 chronological, historical narrative of six days in time.

22 MR. PAOLI: True, Your Honor, except I think the  
23 distinction I'm making is that whether that actually makes a  
24 difference under the PSQIA.

25 I don't believe it does because of the broad

1 definition of what patient safety activities means.

2 The definition itself both includes the critical  
3 analysis portion, but it also includes the development and  
4 dissemination of information with respect to improving patient  
5 safety.

6 So I don't think the privilege can basically be cut  
7 off nearly because you have the additional or excuse me the  
8 initial historical perspective that is given by the person that  
9 is initiating the process. I think the definition of patient  
10 safe activities is broader than that.

11 THE COURT: Does the top half of page 1 of the  
12 report, the patient safety report, does the top half appear in  
13 any other medical record or document of any kind?

14 MR. PAOLI: No, Your Honor. Now obviously Mr. --  
15 since Mr. Berumen was a provider, he has his own medical  
16 records in Mr. Garcia's medical chart. Those have been  
17 produced.

18 So certain information that may have made its way  
19 into the summary can be consistent with what is reported by Mr.  
20 Berumen in his own medical record. But that's -- in terms of  
21 the specific language, the specific text, it is not contained  
22 in the medical chart.

23 THE COURT: Okay. A large part of this legal dispute  
24 turns on the definition of patient safety work product. As we  
25 find in either the guidance or I think it's more than guidance.

1 I think it's the HHS regulation.

2 But I'm looking at page 28 of 45 of your response. I  
3 think the same material is in the Plaintiff's motion, but I'm  
4 looking at page 28 of 45 of your response.

5 And the relevant portion reads patient safety work  
6 product does not including a patient's medical, record billing  
7 and discharge information, or any other original patient or  
8 provider information.

9 Do you know what is meant by the phrase original  
10 patient or provider information?

11 MR. PAOLI: Your Honor, I looked into that, didn't  
12 find anything specifically by way of case law that summarized  
13 or addressed that issue.

14 THE COURT: Okay. Continuing on, what is excluded  
15 from the definition of PSWP is information that is collected,  
16 maintained or developed separately, or exists separately from a  
17 patient safety evaluation system.

18 So the Plaintiff's position is Corizon had a separate  
19 contractual obligation to assemble all or some of what we see  
20 in this patient safety report, a pre-existing free standing  
21 independent obligation to do this. And to that, Mr. Paoli, you  
22 would say what?

23 MR. PAOLI: That the characterization of the  
24 obligation that's summarized by Plaintiff, yes, there was an  
25 obligation imposed by the contract to do the review, but the

1 language cited by the Plaintiff has nothing to do with the  
2 actual documents that are generated here.

3 So, for example, 5.1.2.3 contemplates a mortality  
4 review committee meeting. That's not what the privilege  
5 documents or the documents that are claimed to be privileged at  
6 issue here.

7 5.1.2.3 contemplates the potential consultation or  
8 meeting with the county. That's not what we're dealing with  
9 here.

10 The specific documents at issue here were not  
11 generated pursuant to the specific obligations imposed on my  
12 client under the contract, or the NCCHC standards.

13 They were generated for an entirely different  
14 purpose. And that was the purpose of a specific patient safety  
15 report that was going to be made to the Missouri Center for  
16 Patient Safety. So I think that's the critical distinction  
17 that I believe is necessary to kind of analyzing this issue.

18 THE COURT: How did Corizon comply with the NCCHC  
19 standards in this case?

20 MR. PAOLI: Not sure, Judge, because I don't have a  
21 document that is separate and apart from the document that I  
22 think is ultimately the subject of this particular dispute. I  
23 don't have a separate document for that.

24 THE COURT: Okay. So, far as you know, Mr. Paoli, is  
25 -- did Corizon kill two birds with one stone by satisfying its

1 contractual obligation with the county to comply with NCCHC's  
2 standards and satisfy its contractual obligation with the  
3 Missouri outfit by the creation of the document you sent me?

4 MR. PAOLI: I don't believe so, Your Honor. That's  
5 not my understanding. And I don't think that's the intent of  
6 the declaration in terms of what is specifically identified.

7 Ms. Mooningham says specifically in her affidavit the  
8 sole purpose of these documents was for reporting to a patient  
9 safety organization, not for any other purpose including  
10 compliance with contract obligations or compliance with NCCHC  
11 standards.

12 THE COURT: So there's a gap then -- there's a gap in  
13 my record. Corizon has a contractual obligation to comply with  
14 the NCCHC standards.

15 And those are fairly -- those are fairly intricate.  
16 I mean, it contemplates the production of a fairly significant  
17 informative educational report.

18 You're telling me you don't know whether that was  
19 done and if so, what the work product was that was generated by  
20 that process, yes?

21 MR. PAOLI: That's true, Your Honor. I don't know  
22 whether that was done, whether there's a separate document to  
23 that effect.

24 I don't -- I've never understood the document at  
25 issue here is that document.

1           THE COURT: So if it's Corizon's burden to  
2 demonstrate that this privilege applies, doesn't Corizon carry  
3 the evidentiary burden to show me that there are two separate  
4 things and they are not the same?

5           MR. PAOLI: Respectfully, Judge, I don't think the  
6 burden goes that far. And the reason for that is because  
7 Plaintiff's argument is essentially is, well, you couldn't have  
8 done it for multiple purposes. There must have been some  
9 disclosure with the county or you must have had an alternate  
10 purpose.

11           But the only evidence that's been submitted to the  
12 Court by way of Ms. Mooningham's declaration is that the  
13 documents withheld on -- and claimed to be privileged at issue  
14 here are generated for only pun purpose, the sole purpose. She  
15 specifically uses that word in her declaration.

16           And the sole purpose for creating these particular  
17 documents is not some contractual obligation, not some  
18 obligation with respect to NCCHC standards, but for purposes of  
19 a specific reporting to the patient safety organization that's  
20 at issue under the contract.

21           So, the fact that Plaintiff says, well, there's some  
22 other purposes and you must assume that there's some other  
23 purpose, when the -- that's basically Plaintiff's suspicion in  
24 light of what the contract says and what the NCCHC standards  
25 say, our response is but the only evidence that's actually been

1 submitted to the Court says that the sole purpose of these  
2 documents at issue here was for a very specific purpose of  
3 reporting to the patient safety organization.

4 THE COURT: So the second half of page 1, and this  
5 spills into obviously page 2, who is that person?

6 MR. PAOLI: That is a person who is an internal  
7 corporate office person who's not in Dona Ana County. I  
8 believe it's in the corporate office.

9 I believe Ms. Newell is a physician. It's either a  
10 physician or a nursing provider, but my understanding is that  
11 is a physician.

12 THE COURT: And is your understanding that her  
13 narrative was in the nature of third-party peer review?

14 MR. PAOLI: Well, in yes, Your Honor. When you say  
15 third-party, you threw me off an a little bit. But in the  
16 nature of peer reviewed done by Corizon personnel.

17 She is a Corizon personnel -- was at the time a  
18 Corizon employee. It wasn't an independent third party  
19 separate from the company.

20 THE COURT: I got you. All right. And so, this  
21 entire document then would be sent to whoever the Missouri  
22 outfit is. Ms. Newell does not work for the Missouri outfit?

23 MR. PAOLI: Correct, Your Honor. She does not work  
24 for the Missouri company. She works -- she was at the time a  
25 Corizon employee.



1 THE COURT: I got you. Not involved in any way with  
2 the care given to or withheld from Mr. Garcia?

3 MR. PAOLI: That's correct. She was not a local  
4 provider, was not doing any work in Dona Ana County.

5 THE COURT: Okay. If we go to page 3, there's a  
6 prepared by name. Is that person on site here at Dona Ana  
7 County?

8 MR. PAOLI: She was formally, Judge. She was not  
9 involved in Mr. Garcia's care but at the time, she's a former  
10 employee now. At the time, she was a director of nursing.

11 THE COURT: Got you. And that's what DON stands for  
12 in this document?

13 MR. PAOLI: Right.

14 THE COURT: Okay.

15 MR. PAOLI: Director of Nursing.

16 THE COURT: All right, and HAS stands for Health  
17 Services Administrator?

18 MR. PAOLI: That's correct.

19 THE COURT: Okay, all right. So, Mr. Paoli, and  
20 forgive me if I've already asked this question, but it's  
21 important enough to ask it a second time.

22 So far as you're aware since the effective date of  
23 the peer review contract with the Missouri outfit, has Dona Ana  
24 County ever disclosed to the county or to anybody other than  
25 the Missouri outfit mortality reviews or in custody deaths?

1 MR. PAOLI: Absent a court order, Your Honor, I'm not  
2 aware of any such disclosures.

3 THE COURT: So now let me ask you about Ms.  
4 Mooningham's declaration. She's at Corizon corporate, yes?

5 MR. PAOLI: Yes, Your Honor, not local.

6 THE COURT: What deference or treatment or  
7 credibility do I assign to a declaration in the questionnaire  
8 question mark?

9 MR. PAOLI: Well, Your Honor, in terms of Corizon  
10 satisfying and providing evidentiary matters to the Court with  
11 respect to satisfying its burden to establish the privilege, I  
12 think the normal accepted procedure is that the declaration  
13 should be properly considered by the Court with respect to what  
14 is the sworn testimony being provided and does that sworn  
15 testimony establish that the document at issue meets the  
16 privilege requirements under the statute?

17 Hopefully, I answered that question. Maybe I did  
18 not, but I think that's kind of the -- there has to be some  
19 deference to it because that's the evidence that ultimately has  
20 to be submitted in order to evaluate the merits of the  
21 privilege claim.

22 THE COURT: And if it were controverted by a  
23 competing declaration or some other evidence, then maybe we  
24 would have had had an evidentiary hearing, but that didn't  
25 happen here. So such a hearing isn't necessary? That's your

1 theory?

2 MR. PAOLI: Yeah, that's right, Your Honor. I mean,  
3 ultimately, I think the declaration stands on its own. I don't  
4 think it's contradicted per se by any of the Plaintiff's  
5 exhibits with respect to the specific matters that are  
6 discussed in the affidavit, excuse me, the declaration.

7 THE COURT: In a declaration that is this detailed,  
8 that makes the representations that it does, was -- is of  
9 qualitatively different kind than the one before Judge Browning  
10 and Tanner?

11 MR. PAOLI: I believe so, Your Honor. I was  
12 obviously not counsel in the Tanner case for the Defendant, but  
13 I think it's substantially different.

14 And I would note that with respect to Tanner  
15 specifically, the Court noted that the substantive matters  
16 stated in the declaration that was presented in that case were  
17 substantially different.

18 And in Tanner, the Court -- Judge Browning's decision  
19 says if there was proof that the documents such as clinical  
20 /KAL mortality reviews, patient safety, and error reporting  
21 system, and quality improvement studies are among the documents  
22 at which Tanner seeks to compel discovery, and to the extent  
23 those documents are generated as part of correct cares patient  
24 safety evaluation system, they are subject to the PSQIA  
25 privileges protection. And that's a direct quote from page

1 12424 of Judge Browning decision in Tanner.

2 So from the out said, part of the dispute I think  
3 between myself and Mr. Coyte was that Tanner in my opinion does  
4 not go as far as Mr. Coyte is suggesting as a categorical  
5 rejection of the privilege.

6 It was just an evaluation about the evidence that was  
7 actually presented to the Court and which Judge Browning had an  
8 opportunity to evaluate. I think it's substantially different.

9 THE COURT: All right. Did it -- did you have a  
10 chance at any point in the discovery process either before or  
11 after you disclosed the privilege log to let Mr. Coyte or his  
12 co-counsel know generally how big or how long or how long many  
13 pages the withheld patient safety report had?

14 MR. PAOLI: Not in terms of the number of pages, Your  
15 Honor. I think the privilege log just identified the document  
16 in general terms. It didn't say how pages the document was.

17 THE COURT: Okay, all right. I mean, in some ways, I  
18 you know, I feel for them because he's sort of punching at a  
19 ghost, because he doesn't know -- he doesn't, you know, patient  
20 safety report could be a lot of things. And he doesn't know  
21 whether there were any attachments to it. He doesn't know  
22 whether it was 5 pages or 500 pages. I couldn't stand the  
23 suspense any more. That's why I had to order you to send to be  
24 in camera.

25 Is there a reason why -- is there a reason why the

1 privilege log didn't say this is a five page document Bates  
2 labeled such and such?

3 MR. PAOLI: No, Your Honor. I mean, I think the  
4 standard form privilege log contemplates kind of generally  
5 disclosure of author type of document they created and so  
6 forth.

7 I've never understood previously that you're having  
8 some specific identification of the number of pages. I don't  
9 know that it would necessarily make a difference under the  
10 statute in terms of whether the privilege applies.

11 THE COURT: Is the five-page document the only  
12 submission that Corizon sent to the Missouri company?

13 MR. PAOLI: I'm not aware of any others, Your Honor.

14 THE COURT: Okay.

15 MR. PAOLI: Otherwise we would have provided that to  
16 you in response to the order.

17 THE COURT: All right. So the Missouri company gets  
18 this. It doesn't get the underlying medical records that are  
19 summarized or from which the reader could make his or her own  
20 conclusions?

21 MR. PAOLI: I'm not aware of the actual transmission  
22 of the medical chart to the patient safety organization.

23 THE COURT: Okay.

24 MR. PAOLI: I don't -- I've never understood that's  
25 part of the process.

1           THE COURT: So far as you're aware since Corizon has  
2 begun this patient safety evaluation system process, certainly  
3 by October of 2015, in how many cases whether state or federal  
4 has Corizon taken the position that 100 percent of the  
5 mortality review report is protected by the federal privilege?

6           MR. PAOLI: Judge, I don't know that specifically  
7 just because the client does business in multiple states. I've  
8 only handled cases relating to Dona Ana County Detention  
9 Center.

10           I know of one case involving Corizon that's the  
11 Crawford case cited I think in Plaintiff's reply or maybe  
12 referenced in Tanner where Corizon was a named party and that  
13 ultimately the Court ruled against it, but I just don't know  
14 that off the of my head, Your Honor.

15           THE COURT: I would suspect since Corizon is a  
16 national company and this is a federal privilege, that Corizon  
17 is trying to have a consistent approach for its -- all of its  
18 facilities with respect to inmate deaths?

19           MR. PAOLI: I believe that's probably the case, Your  
20 Honor. I know generally that there is a significant concern  
21 about discovery requests that seek this specific type of  
22 information and the extent of the privilege that is claimed by  
23 the company.

24           I don't know, like I said, I can't comment on things  
25 that happened outside of my scope in terms of beyond Dona Ana

1 County, but I think that's probably a fair assumption.

2 THE COURT: And in your briefing, you referenced one  
3 decision from a judge in Texas that was favorable to your legal  
4 position, yes?

5 MR. PAOLI: That's correct. With respect to a  
6 specific in custody death as opposed to some of the more  
7 general cases that kind of deal with the same issue in the  
8 context of hospitals and so forth.

9 THE COURT: Yeah. And do I understand that the same  
10 judge in two other cases involving in custody deaths ruled the  
11 other way?

12 MR. PAOLI: I'm not aware of that specifically, Your  
13 Honor. I just didn't -- I wasn't aware of that.

14 THE COURT: Okay.

15 MR. PAOLI: I think the Luisa (phonetic) case that I  
16 cited, I don't know that that specifically references other  
17 decisions by that judge on a similar issue involving an in  
18 custody death.

19 THE COURT: Okay. It seem that, and I don't blame  
20 Corizon if this is in fact true, but it seems that its legal  
21 position is becoming increasingly refined so as to take  
22 advantage of the federal privilege and the improvements to  
23 patient safety that it encourages. Is that what Corizon is up  
24 to?

25 MR. PAOLI: No Your Honor, I don't think so. I mean,

1 I think you know --

2 THE COURT: That was a softball.

3 MR. PAOLI: Okay.

4 THE COURT: I mean, I was looking for a yes because  
5 if I was the CEO of Corizon, that's exactly what I would be  
6 doing. I mean --

7 MR. PAOLI: Yeah.

8 THE COURT: -- absent the privilege, there's a  
9 litigation reason not to engage in a whole bunch of reflection.  
10 But with the protection of the privilege, there is -- there's a  
11 refuge or a safety zone in which a health care provider can try  
12 to get better. And it seems to me that that Corizon is seeking  
13 to make sure that it avails itself of the federal protection.

14 MR. PAOLI: Yes, Your Honor and maybe I  
15 misunderstood. I was thinking along the lines of by entering  
16 into the contract in 2015 with the Missouri Center, that's  
17 certainly an indication that the company is seeking to avail  
18 itself of the protection that may apply under the PSQIA.

19 Otherwise it wouldn't have been a reason to do that.  
20 And obviously, my client had operations in multiple states  
21 including in Dona Ana County prior to 2015.

22 THE COURT: Okay, the -- this question is purely for  
23 my curiosity. But the statute dates back to, what is it '98?

24 MR. PAOLI: Yeah, I believe so, Your Honor. It did  
25 pre-date I think some of the -- at least as far as I'm



1 concerned the contract that my client had with Dona Ana County.

2 THE COURT: Okay. And how long has Corizon been in  
3 the business of providing health care services to the confined  
4 community?

5 MR. PAOLI: Quite a while, Your Honor. There was a  
6 previous lead the company was under a different name and called  
7 Prison Health Services. And it was involved in a correctional  
8 health care for I want to say at least probably going back  
9 until the 1990s.

10 THE COURT: Yeah.

11 MR. PAOLI: If not earlier.

12 THE COURT: Right.

13 MR. PAOLI: But that's I think that's an educated  
14 guess on my part.

15 THE COURT: Let me see if I have other questions for  
16 you. So Mr. Paoli right now, those were the questions that I  
17 had for you. Apart from our discussion today, and what you  
18 briefed to me, are there any other points you want to emphasize  
19 before I turn to Mr. Coyte?

20 MR. PAOLI: No, Your Honor. I appreciate the careful  
21 consideration that you've given to me and I'll just stand by  
22 and continue to listen to the questioning.

23 THE COURT: Okay, Mr. Coyte, let's do this. Let me  
24 take about a two or three minute recess and then I'll join you.

25 MR. COYTE: Okay.

1 THE COURT: And if that gives you enough time to go  
2 refill your cup of tea, you got my permission.

3 MR. COYTE: All right, thank you.

4 (Brief recess)

5 THE COURT: Okay, gentlemen, we're back on the  
6 record. So Mr. Coyte, did you learn anything during that  
7 conversation?

8 MR. COYTE: A fair amount I think, yes.

9 THE COURT: Well, I did, too. Your primary position  
10 is that Corizon has an independent contractual obligation to  
11 engage in a mortality review process. And it cannot shield its  
12 compliance with that contractual provision by complying with a  
13 different contractual provision, yes?

14 MR. COYTE: Yeah, the kills two birds with one stone  
15 analogy is seems like, yeah, I mean, they -- they can't switch  
16 from one obligation to another thereby insulate themselves from  
17 discovery.

18 THE COURT: We heard today that Corizon sends nothing  
19 to the county. That it complies with its contractual  
20 obligation, but it sends no email, no document, of any kind to  
21 the county.

22 And I'm just wondering what your reaction is to that?

23 MR. COYTE: Well, I have two or three reactions to it  
24 actually. One is that the county could at any time if it was  
25 doing its job properly ask for it.

1 I mean, that's what they ought to be doing. Because  
2 they're not doing it doesn't mean that you should then give  
3 them a privilege. The county should be doing it. That's one.

4 Two, it also the other way looking at it is, well,  
5 this privilege that we're talking about you can look at it in  
6 two ways.

7 One, the very simple way, which is that they have an  
8 obligation to create this independent of the privilege or the  
9 complicated way, which is have they actually adhered to the  
10 requirements to the federal privilege?

11 And in which case you can need discovery. And I'd  
12 have to start calling county witnesses. And we'd have to start  
13 finding when these documents were transferred. It becomes a  
14 mini trial on this issue.

15 It could be quite expensive. I kind of wanted to  
16 avoid that in the briefing. The idea of an evidentiary hearing  
17 on this subject could get pretty wide pretty quickly.

18 THE COURT: Yeah, true. But you know, this is --  
19 even though we're only talking about a five-page document, I  
20 think this is an important principle of law and it's probably,  
21 you know, it's got some precedent setting qualities to it.

22 Did you serve and IPRA (phonetic) on the county for  
23 whatever mortality review report was produced?

24 MR. COYTE: I must confess I don't remember.

25 Whenever I do a case, I IPRA the county for all documents

1 associated with the death. And frequently, I'd get partial  
2 documents because some of them exist with private contractors  
3 and the county doesn't have them and I may get those in  
4 discovery. Or I get the whole lot depending on who the  
5 contractor is. So there is -- it's hard to tell.

6 THE COURT: Okay. And once you learned -- I know you  
7 were told early on in discovery that no mortality review had  
8 been done.

9 Corizon then changed that to say that one was done,  
10 but it was privileged. Did you serve a new IPRA on the county  
11 or did you rely on the original one?

12 MR. COYTE: I believe I relied on the original one.  
13 I wouldn't have thought to go get another copy of the same  
14 thing.

15 THE COURT: Yeah, okay.

16 MR. COYTE: The --

17 THE COURT: All right.

18 MR. COYTE: I mean, I think I don't know if it -- in  
19 your questioning earlier, of the policy that Corizon has and  
20 whether where it pre-dated the privilege that the company that  
21 they had hired, the policy on its face if you look at it I  
22 think on the bottom of the page, which would be Exhibit 5, I  
23 think is that no, not 5.

24 THE COURT: 6?

25 MR. COYTE: Is it 6? Yeah, 6. At the bottom of page

1 it gives you the references for why they have the policy.

2 And it refers to the NCCHC standards and to the  
3 American Correctional Association Standards, ACA.

4 So the reason the policy exists that they have to  
5 create mortality review is not for the PSQIA. It is for the  
6 standards, the standards that the county requires them to  
7 uphold.

8 So if you take that logic further, they then hire a  
9 company and send their review to them. That would -- because  
10 they haven't sent it to the county or not, it doesn't -- you  
11 see what I'm saying? And I think made the point. It's it has  
12 to happen regardless of PSQIA.

13 THE COURT: I understand the point. I'm going to go  
14 back to the definition of what is not patient safety work  
15 product.

16 And so, Mr. Coyte, excluded from that definition as I  
17 read -- as I read earlier, is any information collected,  
18 maintained, or developed separately, or that exists separately  
19 from a patient safety evaluation system?

20 And I don't mean for this to be a semantic  
21 distinction, but you're absolutely correct that Corizon has an  
22 independent obligation to -- independent from the PSQIA to  
23 collect and maintain and develop this information in  
24 furtherance of its contractual obligation to conduct a  
25 mortality review.

1 I worry whether this record shows that Corizon does  
2 that. It has an obligation to do it. Does it do it separately  
3 from what it puts together to send to the PSES as it were.  
4 Help me with that?

5 MR. COYTE: Well, so you -- I think your question is  
6 saying that if they violate their own standards policies and  
7 contract with the county, is this different to what they'd be  
8 doing if they hadn't violated those policies and contractual  
9 obligations?

10 THE COURT: The -- some -- that's a nice framing of  
11 the question. I'm interested in you answering your question.

12 MR. COYTE: Yeah, okay, then what I would need to do  
13 is do some discovery and find out when they do these things  
14 with the county -- with the NCCHC, do they create these types  
15 of documents?

16 You know, I wouldn't know until we get an evidentiary  
17 hearing going. And it would seem like, you know, I could argue  
18 that, yes, because what else could it possibly look like?  
19 Though I've never seen it, so I don't know.

20 I've got them in other cases where Judge Garza  
21 (phonetic) recently ordered one -- over a lawyer objection, a  
22 similar statutory provision. I think the Tanner discusses in  
23 January of this year. We got a report. And they're not much  
24 of anything, these reports.

25 I mean, there's part might concern in doing these

1 cases they're not all that helpful for doing patient quality  
2 review work, but I don't know in this example. So I guess I'm  
3 in the dark. I need to start deposing people.

4 THE COURT: And did any discovery take place about  
5 this privilege before you filed your motion?

6 MR. COYTE: No, I have no -- until I filed the  
7 motion, I wouldn't have known the concept of what they are  
8 talking about and how they're using it. So I couldn't  
9 anticipate what discovery would be required.

10 THE COURT: So I have a blind spot and I -- as today  
11 has played out, it seems to me that that three of us have a  
12 blind spot.

13 And that is we don't know what if anything Corizon  
14 does to comply with its contractual obligation with the county  
15 to conduct a mortality review process and then to comply with  
16 and frankly document its compliance with the NCCHC standards.

17 We don't know what that report would look like if  
18 Corizon did it. We certainly know, at least Mr. Paoli and I  
19 know, what the report looks like that Corizon says is what they  
20 put together to send to the Missouri company.

21 But I don't know this. And my fear -- let me put  
22 some cards on the table, my fear is that if these two things  
23 are the same, or there's -- or there is substantial overlap  
24 between the two, then Corizon, its legal position has gotten  
25 shall we say less strong, but we have a blind spot. And I'm

1     wondering, Mr. Coyte, what am I supposed to do about that blind  
2     spot?

3             MR. COYTE: Well, I would say that the statute itself  
4     where it says if you are required to create the documents for  
5     some other reason, the statute doesn't give you a privilege.

6             And it gets simpler in the plain language of the  
7     statute. So what could you possibly do that doesn't require  
8     you to create similar documents if you would to follow NCCHC  
9     standard, all the contractual standard of just the mortality  
10    review.

11            THE COURT: I don't know because I don't have the  
12    benefit of your experience or the familiarity with the NCCHC  
13    Standards besides Exhibit 5 to your motion, what they require.  
14    And how that is different from what Corizon prepared for the  
15    patient safety evaluation system. I don't know. And --

16            MR. COYTE: Well, if I may, for a minute, suggest  
17    that given the burden rests with them, that they would have had  
18    an obligation to demonstrate that in their response brief.

19            THE COURT: Your request for production demanded all  
20    mortality reviews, yes?

21            MR. COYTE: Yes. Yeah, and other discovery  
22    questions. We should have got it. If they did another one, we  
23    would have had it. I think Henry would agree with that.

24            THE COURT: I'm looking at page 4 of your motion, the  
25    bottom of page 4, where you either quote directly from or



1 summarize Interrogatory Number 23 and request for production  
2 number 11.

3 MR. COYTE: Yes.

4 THE COURT: And those are certainly -- those would  
5 certainly contemplate whatever mortality review Corizon did to  
6 comply with its obligation to the county and whatever it did to  
7 comply with its obligation to the Missouri outfit.

8 And the privilege log and today's discussion with Mr.  
9 Paoli tells us there is a single document. So I'm not sure --  
10 I'm not exactly sure what a whole bunch of discovery would show  
11 us beyond what we know.

12 MR. COYTE: Well, yeah, I agree. And I don't -- and  
13 I -- Plaintiff does not want to get involved in additional  
14 unnecessary discovery.

15 THE COURT: I don't want you to do it either.

16 MR. COYTE: But what we'll learn, I suspect, is that  
17 if they complied with the NCCHC, they'd have a similar  
18 document.

19 THE COURT: How much help is receiving a copy of  
20 Corizon's sentinel event policy going to be for me?

21 MR. COYTE: I don't know, Your Honor. I don't  
22 recollect reading it.

23 THE COURT: Okay. You've been -- it's been disclosed  
24 to you. You haven't read it?

25 MR. COYTE: Well, I probably read it a long time ago.

1 As I say, I suppose my -- and I apologize to the Court, but my  
2 looking at the problem is one of -- I look at it much more  
3 simply rather than -- well, there are two ways of looking at it  
4 for me.

5 One is very simple. That you -- doesn't matter if  
6 they contracted away their report writing. The report writing  
7 is required for other reasons. And the face of a statute says  
8 that you can't do that. It doesn't make it privileged if you  
9 have to do it anyway.

10 The more complicated look at it is to go through as  
11 the Tanner court did go through a bunch of witnesses and say,  
12 well, when was it written? Where did it go? And what -- and  
13 start, you know, really pulling apart the actual document. I  
14 don't think you have to get that way. I don't think Tanner  
15 court needed to.

16 But I don't think anybody else raised in other cases  
17 the contractual and association standards that were required.  
18 I was surprised to see it in all the briefing. No one thought  
19 to go that path.

20 THE COURT: So the -- in fairness to Corizon, when I  
21 think about a mortality review, not knowing any more than I do,  
22 one purpose of a mortality review could be simply to document  
23 what happened.

24 So that this single event in the life of a detention  
25 sender is captured and not forgotten. That's purpose one to be

1 historical.

2 Purpose two, and this starts to get us toward the  
3 federal statute, is to do more than that. It is to document,  
4 to memorialize, to learn from and to implement corrective  
5 action.

6 And so, not knowing what Corizon -- what Corizon's  
7 policy says, it is required to do, and I think I will learn  
8 that from the sentinel event --

9 MR. COYTE: Yeah.

10 THE COURT: -- I wonder if that policy stops there,  
11 stops here at the historical chronological narrative or does  
12 Corizon impose upon itself an obligation to do this evaluative  
13 or corrective piece? And Mr. Coyte, you've told me you haven't  
14 read in a while. Do you know the answer?

15 MR. COYTE: Well, I would say, yeah, I think the  
16 NHCCA -- the NCCHC standards requires three things, one of  
17 which is a psychological assessment of what happened to learn  
18 from it, which sort of gets to the quality aspect that you're  
19 talking about.

20 The clinical monthly review or clinical review of it  
21 to see what happen from an actual factual point of view.

22 And third, an administrative version. So they're  
23 much more thorough, the NCHCC standards of what you meant to  
24 do.

25 Whether Corizon made their sentinel event policy to

1 match it correctly, one would hope they did. I just don't have  
2 that knowledge in my mind.

3 But there's no point writing this thing just for  
4 historical purposes. The point in writing it is to make sure  
5 that deaths in our community jails have some accountability  
6 associated with them.

7 You have to learn what happens in a jail, a closed  
8 environment, where light does rarely shine in.

9 When someone dies, you better have a look and make  
10 sure it's not bad behavior. And that's why the contract  
11 exists. That's why the standard exists.

12 And the hospital requirement for privilege under the  
13 federal law is incidental to that. That's a lovely thing to  
14 have for hospitals, but it really doesn't matter to a jail,  
15 because you got to do it anyway.

16 THE COURT: On that subject, what do you make of Mr.  
17 Paoli's argument that granting this motion would be in effect  
18 to carve out from the PSQIA in custody deaths? And that's not  
19 -- that shouldn't be the Court's job to create an exception.  
20 That should be Congress' job.

21 MR. COYTE: Yeah, I think the statute itself does it  
22 for you because the in custody deaths have to have a review  
23 anyway. And the PSQIA does not apply to documents that have to  
24 be written anyway.

25 THE COURT: So --

1 MR. COYTE: So you could call it custody death  
2 exception, but it's any -- it's probably the only location  
3 where it exists.

4 But that doesn't mean that the federal people who  
5 wrote though law didn't anticipate organizations trying to  
6 cover documents up by swapping their policy to move away from  
7 making an NCCHC report and suddenly calling it a PSQIA report.

8 THE COURT: The objection that you have to Mr.  
9 Berumen seeking to invoke the privilege for his own work, I'm  
10 trying to understand why you have that objection.

11 Without telling you what he has written, you have  
12 heard me today say that my take on it is a historical narrative  
13 of the care given to the decedent. That's it. That's all it  
14 is.

15 But in order for there to be any meaningful review,  
16 you have to start with a historical narrative of what happened.  
17 Wouldn't that component be part and parcel of the review that  
18 the privilege seeks to protect?

19 MR. COYTE: I would think that if I was to really  
20 want to do a self-critical analysis, I would take my medical  
21 records of the events, maybe the videotapes of the events and  
22 send them to an independent company to look at them with an  
23 independent expert much as we have done as Plaintiffs in this  
24 case, and then, reach a conclusion.

25 You don't need to ask him to review the history of

1 his own medical records, but then you might if had some  
2 questions about what happened and you needed a statement from  
3 him, like a witness statement. So you could back and say, I'd  
4 like to talk to you about what you did with your care.

5 But for him to create the report himself in some  
6 effect, because I believe they identified him as one of the  
7 authors of the report, that would seem to take it to so far  
8 away from a self -- or a critical review analysis as to make it  
9 meaningless unless he was asked to unburden himself in the  
10 history analysis and self-criticize himself.

11 But I don't -- I wouldn't expect that to work either.  
12 You need a third party to do it.

13 THE COURT: Well, I wonder if this is just that his  
14 contribution to a report was all preparatory to the third-party  
15 providing the peer review for which Corizon contracted?

16 It seems to me that this is a process that is built  
17 in phases and his on the ground narrative of what happened was  
18 the first domino to fall, but there were people -- we've heard  
19 today Ms. Newell, a doctor at on staff at Corizon and I'm sure  
20 others were involved in whatever the rest of this evaluative  
21 process was. I just wanted to make sure I understood your  
22 objection.

23 Let's talk about Judge Browning's Tanner decision.  
24 And Mr. Coyte, some day, I will forgive you for making me read.  
25 I'm not sure today is that day, but some day, I'll forgive you.

1 I have to say Mr. Paoli's on to something when he  
2 points out that there was a difference in the declaration or  
3 the evidence submitted to Judge Browning in that case for the  
4 purpose of invoking the statute compared to what Corizon did in  
5 this case with the Mooningham declaration. And I want to give  
6 you a chance to weigh in on that.

7 MR. COYTE: Well, yeah, I think I sort of alluded it  
8 -- to it earlier. I am surprised that the litigants, the  
9 Plaintiffs in that case asking for the documents didn't simply  
10 point to the other alternative reasons why they had to provide  
11 this document.

12 To go down this evidentiary review path, I thought,  
13 was quite unnecessary for all parties. And I know that they  
14 had also claimed Roya (phonetic), the state statute and some  
15 other privileges that might have taken them down that path as  
16 well.

17 And I didn't look at the case that deeply to think  
18 that that's why they did it. But the PSQIA is a -- and I'm  
19 doing and also as an aside there. It could have been some of  
20 the reasons was the relevancy, too. I'm not sure if they  
21 conceded relevancy.

22 Whereas in this case, no one has asserted that the  
23 material isn't relevant. So an evidentiary hearing or an in  
24 camera review in my mind are totally unnecessary when you have  
25 statutory or you have contractual or you have NCHCC standards

1 requirements, all of which the statute itself says you don't  
2 get to insulate yourself from something you have to produce any  
3 way.

4 And when I say produce, I mean, create, not give up.  
5 Right? So in that production where it keeps getting me tripped  
6 up here because it's production meaning you create it. If you  
7 have to create it, then you don't get to use this statute. If  
8 you voluntarily create it, then it's a good statute to rely on  
9 because you will encourage that and Corizon would be encouraged  
10 to do this sort of thing, if not, for the fact that they have  
11 no choice but to do this kind of thing.

12 And thus, you don't need to go the hard way down into  
13 evidentiary depositions when was it written, who wrote it, what  
14 was it for, did the county get a copy, did -- et cetera, et  
15 cetera, et cetera.

16 THE COURT: Well --

17 MR. COYTE: Simple as that.

18 THE COURT: -- it -- I wish it were. Here's the  
19 wrinkle. Corizon has a contractual obligation to create  
20 something called a mortality review.

21 I don't know and you guys don't know whether that is  
22 synonymous with, co-terminus with and the same thing as the  
23 five page report I've been given.

24 I don't know whether there's any additional  
25 self-correcting self-evaluation dimension to what has been



1 withheld from you that is additional to what Corizon was  
2 already required to create.

3 And so, I'm going to reserve judgment until I see  
4 that policy. I asked Mr. Paoli what treatment I should give an  
5 un rebutted declaration. And he gave me his answer. And I'd  
6 like yours.

7 MR. COYTE: Well, I would give it the -- well, the  
8 treatment I gave it I guess was the idea that it's contradicted  
9 by the actual record that you have in front of you, that it  
10 isn't the only reason why it's created.

11 And so, this person may think it's the only reason  
12 it's created, but that without cross-examining or ensuring of  
13 these contracts, yeah, I could imagine you're in front of the  
14 Court, we bring her here and I would say, well, did you know  
15 about the county contract. And here's a copy. Wouldn't you  
16 agree that they have to create a document like this?

17 And I imagine the person would say, well, yeah, I  
18 suppose they do. And here's the NCCHC standards. Wouldn't you  
19 agree it required to create this elsewhere? Yes.

20 So your document of your affidavit is not complete  
21 and it's somewhat misleading, isn't it? And I imagine I'd get  
22 yes all the way through it.

23 THE COURT: The NCCHC standards that you have sent to  
24 me in Exhibit Number 5, is there any other standard besides  
25 this one that speaks to any aspect of this question? I don't

1 need to go digging through any more tulips to look for any more  
2 legal authority, do I? You rest on this?

3 MR. COYTE: Yeah, I think the standard itself we gave  
4 you is a piece of it. And I can't remember if what I gave you  
5 included the three parties I discussed.

6 There are three versions. I don't think they do them  
7 all the time these because these would marvelous if they did,  
8 but the three versions of the review should take place. And I  
9 think that was encompassed in what if provided you and I rest  
10 on that.

11 THE COURT: Okay. This one has -- this one has two,  
12 the administrative review and then part two is the clinical  
13 mortality review.

14 MR. COYTE: Yeah, is -- sorry, I was wondering if I  
15 missed. The third is a psychological review.

16 THE COURT: And it's in here. And that is for a  
17 psychological autopsy for deaths by suicide.

18 MR. COYTE: No, I think it was a -- the one I'm  
19 recollecting is an actual psychological review to the whole  
20 death from the perspective of a -- of the organization. No?

21 THE COURT: That's not here.

22 MR. COYTE: Oh, okay. I think I've given you --  
23 well, since what I've provided you is what I provided you, Your  
24 Honor, I don't think it would be --

25 THE COURT: All right.

1 MR. COYTE: -- necessary to do anything else.

2 THE COURT: Okay. Let me see if --

3 MR. COYTE: Unless, yeah, I mean, unless I could have  
4 my staff look for the final piece to that, to see if I'm right  
5 and let you know.

6 THE COURT: Well, if --

7 MR. COYTE: We could give you --

8 THE COURT: -- it's -- I just want to have -- and I  
9 want all of us to have --

10 MR. COYTE: A full record, yeah.

11 THE COURT: -- the full record and the proper  
12 battlefield. And I just -- earlier today, you had talked about  
13 a psychological dimension to this, which was broader than  
14 suicide. And I just hadn't seen it.

15 MR. COYTE: We'll get back to you if it exists by  
16 tomorrow.

17 THE COURT: So Mr. Coyte, those were the questions  
18 that I have for you. Based -- besides your answers today and  
19 what you briefed to me, is there anything else that you wish to  
20 emphasize?

21 MR. COYTE: No, I think the emphasis is in custody  
22 deaths are different to hospitals. That's about it from the  
23 Plaintiff's point of view.

24 THE COURT: Okay. Mr. Paoli, this isn't - again,  
25 it's not your motion. It is your burden. I started with you

1 and I want to give you a chance to comment on any aspect of my  
2 conversation with Mr. Coyte, if you wish to?

3 MR. PAOLI: So none -- I don't have too much, Your  
4 Honor. I think the -- Your Honor picked up on the point here  
5 with respect to the declaration from Ms. Mooningham essentially  
6 being unrebutted.

7 I don't know necessarily that -- I tend to agree with  
8 Mr. Coyte. I don't know at this point the benefit of a lot of  
9 little discovery on the issue, given kind of where we are and  
10 ultimately the discovery requests that was sent to us basically  
11 saying produce the mortality review.

12 There was no other document produced, other than the  
13 documents that are claimed to be privileged. So I'm not sure  
14 that there's a ton of extra benefit to that.

15 You know, I suppose in all discovery disputes,  
16 there's probably benefit to the parties trying to confer, but I  
17 think ultimately, we're here because the parties had a little  
18 bit of a disagreement with respect to the scope of the Tanner  
19 decision and exactly how far that went. And that's I think  
20 what prompted Plaintiff to file the motion to compel.

21 THE COURT: So the -- so here's where we're left, Mr.  
22 Paoli. Corizon had -- let's assume -- let's hypothesize that  
23 there was no PSQIA. Corizon had a contractual obligation to  
24 conduct a mortality review and the NCCHC standard that Corizon  
25 has adopted dictates what that mortality review needs to

1 consist of and it -- to the reasonable person contemplates the  
2 production of a report as a working document, as a baseline  
3 document.

4 As I sit here today, I'm virtually certain that what  
5 you sent me is what Corizon would have created if the PSQIA  
6 were not in the United States Code.

7 And through no fault of yours, you can't point to me  
8 -- point me to any evidence that shows that Corizon complied  
9 with its contractual obligation to the county unless that  
10 compliance is reflected in the five page document you sent me  
11 on Tuesday morning, correct?

12 MR. PAOLI: That's correct, Your Honor. I'm not  
13 aware of any separate reporting to the county. I'm just not.  
14 I don't know of any. I've never been informed of any. I don't  
15 know of any such separate document.

16 THE COURT: All right. Gentlemen, I wish I could  
17 promise you that I would have a decision by the end of the  
18 year, but I don't want to overpromise and under deliver.

19 But I will have an answer to you by the end of  
20 January. I'm the criminal court duty judge the first half and  
21 then I have five settlement conferences the second half of  
22 January, but I'll get you a decision but then.

23 And I know that this issue is pending before Judge  
24 Swayze in another case. And I talked to him, because I didn't  
25 want us to have conflicting schedules about this and I think

1 he's going to wait to let me go first.

2 You know, he can get just persuasive authority on  
3 East Central and Albuquerque if he wants, but I think he's  
4 going to look for some guidance.

5 Which of you is going to send me the sentinel event  
6 policy?

7 MR. COYTE: Henry, do you want to do that or I'm  
8 remote, so.

9 MR. PAOLI: Yeah, so Your Honor, I'm happy to do  
10 that. Let - can I have until Monday, Your Honor? The only  
11 reason I bring that up is I was looking at the policy and  
12 procedure manual that's been produced in discovery. And I'm  
13 not finding it very readily the sentinel event policy. I need  
14 to confer with the client. I just don't -- I don't have a  
15 ready explanation because the Court caught me a little off-  
16 guard.

17 And so, I just ask for close of business Monday so I  
18 can kind of get my head around what's going on on that issue.

19 THE COURT: That's fine, that's fine. And I'm  
20 referring to whatever Corizon means in Plaintiff's Exhibit  
21 Number 6.

22 MR. PAOLI: Yeah.

23 THE COURT: Yeah, that's fine, Monday is fine.

24 And Mr. Coyte, again, if what you have sent me in  
25 Exhibit 5 is not the precise version of the NCCHC standard,

1 then you'll have until close of business Monday to send me the  
2 substitute.

3 MR. COYTE: Okay.

4 THE COURT: All right, gentlemen.

5 Mr. Coyte, Merry Christmas in England. Safe travels  
6 back.

7 MR. COYTE: Thank you.

8 THE COURT: And I hope the weather there is better  
9 than it normally is in December in England.

10 MR. COYTE: There's actually snow out there. It's  
11 beautiful right now, but it's going to rain on -- on the  
12 weekend. And I wish you all in New Mexico happy Christmas,  
13 too.

14 THE COURT: Okay, and El Paso. All right

15 MR. PAOLI: Thank you.

16 MR. COYTE: And El Paso, yes.

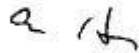
17 THE COURT: Gentlemen, thank you very much.

18 MR. PAOLI: Thank you, Judge.

19 (Proceedings concluded at 10:59 a.m.)  
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**CERTIFICATE**

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

December 30, 2022

Chris Hwang

Date

Court Reporter